however, was that they were "not directly related to the provision of subscriber loops are not necessary for the provision of universal service" and resulted not from the provision of essential telecommunications services, but "rather result from managerial priorities and discretionary spending."[20]

Given these findings, movants should consider themselves fortunate that the Commission permitted *any* support for these costs via the Universal Service Fund. The Commission plainly did not act arbitrarily in limiting the recovery of these costs to 115 percent of the average corporate operations expenses for similarly sized companies.

### C. The Commission's Rules on Support for Acquired Exchanges Are Reasonable.

There is no merit to movants' challenge to the Commission's rules on acquisition support for newly-acquired exchanges will discourage investment in rural telephone companies. Motion at 17-18. The Commission simply acted to prevent its transitional support for rural telephone companies from becoming the impetus for the purchase and sale of exchanges. Accordingly, the Commission held that for purchases occurring after the date of its order, the support afforded the exchange would not change depending on the rural or non-

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[20]Universal Service Order ¶ 283.

rural status of the purchaser.[21] This decision was reasonable, and hardly constitutes a basis for a stay.[22]

### D. The Universal Service Order Does Not Violate the Regulatory Flexibility Act.

Finally, movants assert without explanation that the Commission failed to consider "significant alternatives" to the action taken in the Universal Service Order. Motion at 18. However, movants fail to identify even one such alternative the Commission should have considered. Accordingly, movants have failed to demonstrate a violation of the Regulatory Flexibility Act.

## III. THE BALANCE OF THE EQUITIES FAVORS DENYING THE STAY.

Movants propose three ways in which they will be irreparably harmed if the Commission does not stay the provisions capping the corporate operating expenses movants can recover through the high cost loop fund; requiring portability of Universal Service Fund support and recovery of local switching

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[21]Id. ¶ 308.

[22]Indeed, movants cannot possibly be harmed by this aspect of the Commission's order so long as they maintain the *status quo*. The only harm they would suffer is being deprived of the opportunity to leverage the generous transitional support afforded rural carriers by acquiring as many exchanges as possible in order to expand their eligibility for that support.

costs through DEM weighting; and treating DEM weighting separations rules as a subsidy. The Commission should reject these claims.

### A. Movants Will Not Suffer Irreparable Harm to their Customer Base, Goodwill, or Reputation.

On movants' theory, the new regulations will result in a "drastic reduction in revenue" which will prevent them from upgrading their networks to satisfy their customers and to meet the new FCC requirements for eligibility for Universal Service Fund support. Motion at 21-22. Movants are particularly concerned that they will lose their chance to compete for new contracts with schools, libraries, and rural health care providers in their service areas because they will not have the funds to upgrade their infrastructure appropriately. Id. at 22. Moreover, movants complain, that now that they are being forced to operate in a competitive environment, they will be prevented from recovering these losses by raising rates. Customers will simply switch to another carrier rather than pay the higher prices. Id. at 23. Movants point out that "[c]ustomer goodwill is inevitably lost when a business is unable to provide requested service or seeks to raise its prices." Id.

These claims fail for at least two reasons. First, movants have failed to show that they will suffer losses of such magnitude that they will be unable to compete for customers or bid for public contracts. In order to prove

irreparable harm, movants must demonstrate an injury that is both "certain and great." Wisconsin Gas, 758 F.2d at 673-74; see also Iowa Util. Bd., 109 F.3d at 425; In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, FCC 97-216, slip op. at 14 n.59 (rel. June 18, 1997) ("Access Charge Stay Order"). As the court explained in Wisconsin Gas:

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.

758 F.2d at 674. In this case, movants fail to show either that their injury is likely to occur or that it will be substantial.

It is clear that the concerns of movants go to the risks inherent in a competitive market rather than the Commission rules themselves. However, competition is the policy of the country and movants must accept that. Indeed, in its orders, the Commission has taken great care to cushion the transition to competition for the rural providers. They will receive precisely the same subsidy for universal service from the Universal Service Fund that they did under the old DEM scheme for the next three years. The only difference is that CLECs are now be eligible to receive these funds. Thus, movants will

only lose revenue to the extent that competing carriers enter their markets and provide service qualifying for universal service funding.

It is simply inconceivable that a sufficient number of CLECs will enter these small markets in sufficient numbers during the time it will take to perfect an appeal in this case to cause the sorts of losses suggested by movants. Entry into the local telephone markets is not progressing at a pace that the FCC, CLECs, or American consumers would like. As has recently become public knowledge, MCI alone has invested more than a billion dollars in local markets and has yet to begin to see a return. If open competition has not started in the highly lucrative urban markets around the country, then we certainly should not expect (as movants assume) competition to develop instantaneously in the smaller markets at issue here. It is closer to fantasy than to certainty that CLECs will divert sufficient revenues to cause movants the substantial losses they are projecting.

Second, even if movants were to suffer losses of the magnitude they are suggesting, they have not shown why they could not secure alternative funding to upgrade their networks and compete to protect their market position. It is well-established that movants have a duty to mitigate any harm alleged in support of an application for stay. See Wisconsin Gas, 758 F.2d at 675; Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301,

309 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985). In this case, movants complain that under the FCC's orders, they will not be able to compete for contracts with schools, libraries, and health care facilities because they will lack the funds to upgrade their networks. If, however, a competitive market would sustain such investments, then surely movants can secure funding from a bank or other lender to make the improvements during this transitional period.

Movants also argue that their goodwill will be damaged if they raise their prices now to cover their projected shortfalls, but later lower their prices if the Commission's rules are vacated on appeal. Motion at 24. According to movants, this "'rate churn'" will leave its customers "thoroughly confused," and movants' goodwill will suffer as a result. Id. Even if such a price increase were warranted, this argument proves too much.

The Commission should reject the suggestion that any fluctuation in prices brought on by FCC orders implementing the Telecommunications Act requires that those orders be stayed. If the Commission were to take this alleged type of harm seriously, then it would counsel for a stay of every FCC order issued under the Act until the last appeal of the last detail of the Commission's program for implementing the Act was complete. Moreover, movants are not helpless in this regard. Their affirmative duty to mitigate any alleged harm from the orders certainly extends to providing a simple

explanation to their customers of any price changes attending the Act's implementation.[23]

### B. Movants Will Not Suffer Irreparable Monetary Harm.

Movants next contend that the cap on the amount of corporate operation expenses that can be recovered from high cost loop support and the FCC's decision to permit CLECs equal access to universal service funds where they qualify, combine to prevent rural telephone companies from achieving a fair rate of return on their interstate investments. Motion at 26. Movants recognize that financial losses such as these are normally considered recoverable and, therefore, insufficient to support a stay. Id. at 25. Nonetheless, movants argue that they will be foreclosed from recovering these losses later due to the presence of new competitors in their markets. Id. at 27. Movants' position is untenable.

As movants recognize, economic losses do not usually suffice to demonstrate irreparable harm. See,e.g., Iowa Util. Bd., 109 F.3d at 426 (acknowledging maxim that "'economic loss does not, in and of itself,

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[23]Movants also assert that their goodwill will be harmed because CLEC's are likely to blame them for later price increases if the FCC's orders are vacated. Motion at 24. Not only does this claim suffer from the same problems discussed with regards to the alleged threat of future price fluctuations, it is speculative and an unduly sharp criticism without of the support of any evidence.

constitute irreparable harm'") (quoting Wisconsin Gas, 758 F.2d at 674); Central & Southern, 757 F.2d at 309 (holding that "'revenues and customers lost to competition which can be regained through competition are not irreparable'").[24] Only in exceptional circumstances, as where the movant is able to show that effective monetary relief will not be available at a later date, have courts granted stays based on lost revenue. See Iowa Util. Bd., 109 F.3d at 426 (issuing stay based on finding that "[i]n this case, the [movants] would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned . . . .").[25]

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[24]See also Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) ("[e]conomic loss does not constitute irreparable harm"); Cunningham v. Adams, 808 F.2d 815, 821-22 (11th Cir. 1987) (holding that loss of profits was not irreparable harm because could be "undone through monetary remedies"); Ohio ex rel. Celebreeze v. NRC, 812 F.2d 288, 290 (6th Cir. 1987) ("economic loss does not constitute irreparable harm, in and of itself"); Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc., 762 F.2d 1374, 1376 (9th Cir. 1985) (holding that loss of customers and revenue was "purely monetary harm measurable in damages" and therefore not "irreparable"); Dos Santos v. Columbus-Cuneo-Cabrini Medical Ctr., 684 F.2d 1346, 1349 (7th Cir. 1982) ("temporary loss of income does not usually constitute irreparable injury because this deprivation can be fully redressed by an award of monetary damages").

[25]See also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (upholding grant of preliminary injunction where damages could not be calculated subsequently due to "relative novelty" of subject matter of suit); Baker Elec. Co-op., 28 F.3d at 1472-73 (reversing denial of preliminary injunction because defendant had Eleventh Amendment sovereign immunity from subsequent suit for money damages); Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1226-27 (8th

Even accepting for the purposes of argument that movants will not receive a fair rate of return under the rules,[26] they are in no danger of suffering unrecoverable damages. The FCC enjoys the authority to adjust rates and to order reimbursements to the rural telephone companies if its orders are overturned on appeal. See Access Charge Stay Order, slip op. at 15.[27] As is discussed above, it is highly unlikely that these incumbent carriers will face sufficient competition to preclude such corrective measures by the Commission. See id. (rejecting same argument posed by ILECs in requesting stay of Access Charge Order). Moreover, the FCC has made clear that these are only transitional measures in any event and has indicated its intent to address the ILECs claims regarding their alleged entitlement to historic cost recovery in another proceeding. Thus, any legitimate grievances voiced by movants will not go unaddressed for very long.

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Cir. 1987) (granting relief where defendants likely to be judgment proof).

[26]Since MCI does not have access to the data and calculations upon which the movants rely, MCI can offer no comment on movants' projected rate of return figures. See Motion at 26-27 & exs. 2 & 3.

[27]See also Reynolds Metals, 777 F.2d at 763 (denying relief and finding it almost frivolous to argue that FERC or court of appeals would not order refunds where appropriate).

### C. Movants' Future Negotiations and Arbitrations Will Not Suffer Irreparable Harm.

Finally, movants claim that the Commission's rules will irreparably harm their ability to negotiate interconnection and resale agreements with new entrants to the local markets. Motion at 29-31. Relying on the 8th Circuit's decision in Iowa Utilities Board v. FCC, movants contend that the FCC's rulings should be stayed because they "will send false, uneconomic entry signals to prospective entrants; they will tend to skew the expectations of CLEC negotiators, and state arbitrators." Motion at 30. This argument fails as well.

Again, movants press their claim too far. If the Commission accepts this argument, then it is hard to imagine any ruling or order relating to the Telecommunications Act that will not have to be stayed. This is surely not the import of the Eighth Circuit's holding in Iowa Utilities Board.

In that case, the court of appeals was reviewing the FCC's order that directly set the prices ILECs could charge new entrants for interconnection, unbundled access to network elements, and resale of their services. In other words, the order there took the central element of pricing completely off the negotiating table. In contrast, the order at issue here addresses the peripheral support that carrier may expect when providing particular services. While the

universal support provisions certainly will have some influence on negotiations and arbitrations, they are a far cry from actually setting the prices for the parties. Thus, future negotiations will not be irreparably harmed by the Commission's denial of the stay.

## IV. MCI AND OTHER CLECS AS WELL AS THE PUBLIC INTEREST WILL BE HARMED IF A STAY IS GRANTED.

The harm to others and the public interest are substantially related and should be considered together in this case. MCI and other CLECs will be harmed by the proposed stay for the very reasons the FCC issued the orders. The Commission recognized that the ILECs would enjoy an artificial competitive advantage in the smaller markets if the levels of universal service support were not equalized and that this would further delay entry by CLECs. As the Commission is well aware, CLECs are having a difficult enough time as it is breaking into the larger, more lucrative local markets. Staying these provisions and permitting the ILECs continued access to funding that rightfully should be available to all competitors equally will only further delay CLEC entry into these less lucrative markets.

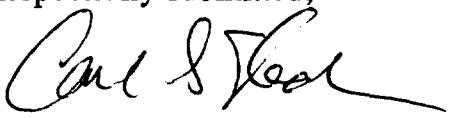
Such delayed entry, of course, translates directly into the sort of needless delay in the development of local competition that the Commission has

found to be against the public interest. The Commission has recognized that potential CLECs face sufficient barriers to entry without adding further disincentives, like higher access charges or insufficient universal service support. Access Charge Stay Order, slip op. at 18. Movants' arguments that its subscribers would actually benefit from a stay in this case must be rejected. The public interest in high quality, low priced telephone service lies with developing competitive local markets, not with the purported benevolence of the incumbent monopolists.

## CONCLUSION

For these reasons, the Commission should deny the requested stay.

Respectfully submitted,



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I hereby certify that on this 7th day of August, 1997, a copy of the foregoing document was served by first-class United States mail, postage prepaid, on the counsel listed on the attached list.

Carl S. Nadler

Dated: August 7, 1997

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